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Supreme Court, U.S.
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No. 01-1486

IN THE

Supreme Court of the United States

BEVERLY B. MANN,
Petitioner,

v.

THE UPJOHN COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Illinois Appellate Court, First District

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PETITIONER'S REPLY TO BRIEF OF RESPONDENT THE UPJOHN COMPANY IN OPPOSITION

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I. Introduction

Mann is convinced after reading Upjohn's three-page Argument in its Brief in Opposition that it's counsel believes that no member of any justice's staff will read Mann's petition, or will read even the six questions it presents, before first reading the brief in opposition to it. So Upjohn's strategy is to fail even to *acknowledge* any of the actual legal issues that the petition presents, and instead to feign a response to it by discussing phantom issues so banal, so obviously inappropriate for this Court's review, that after reading the brief in opposition to it no member of this Court's staff will even open the petition itself.

II. Upjohn Misrepresents the Express Holdings in Two Illinois Opinions, and the Grounds Upon Which Petitioner Appealed Below and Upon Which She Seeks Review By This Court; It Uses Its Brief in Opposition as a Decoy.

As a preliminary matter, Lake Forest has filed a motion in this court to dismiss the appeal or, in the alternative, to strike certain portions of Gillen's brief. Lake Forest contends this court lacks jurisdiction to hear the appeal because Gillen voluntarily dismissed the case. We disagree.

Lake Forest is correct in stating that as a general rule a plaintiff cannot appeal an order of voluntary dismissal. (See *Kahle v. John Deere Co.* (1984), 104 Ill. 2d 302.) An order of voluntary dismissal cannot be appealed by the plaintiff since he or she requested the order and thus is protected from prejudice by the statute of limitations which gives the plaintiff the absolute right to refile the action within one year of a voluntary dismissal without prejudice. (See Ill. Rev. Stat. 1989, ch. 110, par. 13-217; *Kahle v. John Deere Co.*, 104 Ill. 2d at 306.) *However, Gillen is not attempting to appeal the order for voluntary dismissal.* [Emphasis added.] Rather, Gillen is asking this

> court to review the court's dismissal of count IX based upon Lake Forest's motion to dismiss, as well as the court's granting judgment on the pleadings as to all damages relating to the sinking of the tug "Andrew J," which was also based upon a motion made by Lake Forest.

The above is an excerpt from *Edward E. Gillen Co. v. The City of Lake Forest*, 581 N.E.2d 739 (1991), which is one of two case authorities that Upjohn cites for its proposition at p. 6 that, "Under Illinois law, petitioner could not appeal the circuit court's order dismissing her case for want of prosecution because she invited the court to do so." But, of course, Mann *did not appeal* from the circuit court's order dismissing her case for want of prosecution, any more than did Gillen in *Gillen*. She appealed from summary judgments that were entered on several counts in her complaint *many months before* the circuit court entered its order dismissing her case for want of prosecution. She also appealed from the circuit court's two repeatedly-reiterated utterly off-the-wall and grossly expensive (and, for Mann, financially impossible) prerequisites to the grant of her motions for a single trial date continuance of sufficient length to enable her to retain trial counsel – which was what *rendered* her unable to try the case. And she appealed from the circuit court's *refusal to vacate* the dismissal for want of prosecution pursuant to 735 ILCS § 5/2-1301(e) and several Illinois supreme and appellate court cases that interpret that statute.

Indeed, a key issue in her appeal to the Illinois Supreme Court and her petition to this Court is precisely whether the Illinois Appellate Court's *refusal to consider* her appeal from those summary judgments that those judgments were entered before the dismissal of the remaining counts and were judgments on the substantive merits and unrelated to the later dismissals for want of prosecution, violated her Fourteenth Amendment rights to due process and equal protection of the law. Indeed, another key issue was, and is, whether the Illinois Appellate Court's *refusal to consider* her Fourteenth and Seventh Amendment challenges to the circuit court's

stated grounds for denying her repeated motions that sought a single trial date continuance without which she could not try the case constituted an violation of the Fourteenth Amendment. Indeed, another key issue was, and is, *whether* the circuit court's *stated grounds* for denying her repeated motions seeking a single trial-date continuance of at least three months (so that she could have trial counsel) *did* violate the Fourteenth and Seventh Amendments as she had claimed throughout; as Mann stated in her petition, one after another circuit judge told her on the record that those reasons, which countermanded a state statute, 735 ILCS § 5/2-1007, were *de facto* official policy of the county's court system, and in fact the chief judge himself confirmed it at a memorable hearing in this case on November 4, 1997.

But at the heart of her petition to this Court (as it was at the heart of her appeal to the Illinois Supreme Court) is the appellate court's stunning *sua sponte* litany of *its own conclusions of fact* concerning Mann's and Upjohn's counsel's conduct *during the trial-court stage* in the litigation.

Even were those conclusions of fact actually *supported* by the trial-court record, and they were not, they could not under Illinois law constitute grounds for the appellate court's refusal to consider Mann's appeal from the summary judgments entered on the merits and, on the basis of a court policy that Mann is challenging as unconstitutional, from the repeated denials of the trial-date continuance Mann needed in order to try the case. As Mann says in her petition, Illinois Supreme Court Rule 219 delineates the procedural due process for trial-court determinations of the sort that the appellate court in this case purported to make, and Illinois law provides no mechanism whatsoever for appellate courts to engage in such fact-finding. Nor does Illinois law provide for the *non sequitur* denial, of appellate review as a sanction even for *validly determined* judicial findings of fact of that nature. And these facts weren't even validly determined, nor determined by the trial court at all. Upjohn does not contest Mann's assertion that there were *no such trial-court determinations an that there were several trial court determinations. Specifically to*

the contrary. Nor does Upjohn challenge Mann's assertion that the appellate court lacked both the legal authority and the logisti-cal apparatus to *determine* issues of fact. Nor does it dispute her allegations of specific, egregious conduct on the part of its own counsel.

Mann's petition articulates these issues, yet Upjohn addresses *none* of them. Instead, Upjohn claims that the appellate court acted as in accord with Illinois law and that therefore its actions and the purported Illinois law to which it adhered cannot be challenged as unconstitutional. But if so, then Illinois law condones – in fact, requires – attorneys' to breach the state's codified procedural rules, as well to violate a few of canons of legal ethics. The appellate court cited, for example, Mann's having objected to several waves of Upjohn's torrential sets of interrogatories, for example, as a basis for its ruling that Mann was not entitled to appellate review or, for that matter, even appellate review of most of the rulings from which she had appealed; by objecting to Upjohn's sets of interrogatories, Mann had forced Upjohn to file a motion to compel her to respond to them, thus Mann was not entitled to a trial-date continuance or to appellate review of the summary judgments. It was of no moment that the trial court in fact had denied Upjohn's motion to compel, upon an express finding after looking at the interrogatories that, just as Mann had said when objecting to them, the sets of interrogatories exceeded exponentially the statutorily allowed number of interrog-atories. All that mattered to the appellate court was that Mann had objected to them, not whether the trial sustained the objection upon unequivocal tangible evidence that Mann's objection was warranted.

If breaching that Rule (time and again, as Upjohn did) and breaching the canons of legal ethics (as Upjohn's counsel did) effectuates the waiver *by the opposing party* of a necessary trial-date continuance, or of the right to appellate review on the merits of summary judgments, or of anything else, it would follow necessarily that counsel's *adherence to*, rather than breach of, those Rules constitutes malpractice.

Upjohn also misrepresents to this Court that Illinois law authorizes the trial court to vacate dismissals for want of prosecution only when the dismissal order was entered in error, a remarkable and knowing misstatement of both Illinois statute, extensive Illinois case authority, and trial court practice. In fact, the Cook County Circuit Court's Law Division, where this case was litigated, has a regular twice-weekly motion call that handles motions to vacate dismissals for want of prosecution *irrespective of whether the dismissal order was entered erroneously or not.* And as the pertinent statutes, 735 ILCS § 5/2-1301(e) and 735 ILCS § 5/2-1401, themselves state, and as very extensive appellate authority demonstrates, most orders dismissing cases for want of prosecution are *not* entered in error; they are entered because the plaintiff failed to appear at a hearing.

Nor, as the language quoted above from *Gillen* makes clear, does that opinion say or imply, as Upjohn represents, "that under Illinois law petitioner could not appeal the circuit court's order dismissing her case for want of prosecution because she invited the court to do so." *Gillen* says instead, "An order of voluntary dismissal cannot be appealed by the plaintiff since he or she requested the order and thus is protected from prejudice by the statute of limitations which gives the plaintiff the absolute right to refile the action within one year of a voluntary dismissal without prejudice." This refers to a procedural rule *inapplicable in Mann's case*, under *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 497, 693 N.E.2d 338 (1998).

Counsel Marie Woodbury, whose name appears on Upjohn's Brief in Opposition, is well aware of *Vaughan*. She was questioned extensively about it at oral argument below, and the appellate court cited the pertinent portion of it in its opinion in this case.

In the same vein, Upjohn cites *J. L. Simmons Co. Inc. v. Firestone Tire and Rubber Co. Inc.*, N.E.2d 273, 108 Ill. 2d 106 (1985), for its proposition that, "It is fundamental to adversarial process that a party cannot claim error when it induces the trial judge's mistake." In *Simmons*, a party that

had offered a particular jury instruction *was asserting on appeal* that the trial court's decision to give that selfsame jury instruction constituted error. Upjohn's citation to *Simmons* thus further misrepresents to this Court that Mann had appealed below from – and is appealing here from – the entry of the order dismissing the case for want of prosecution, rather than from orders noted above from which she actually *was*, and *is*, appealing.

But surely it also is fundamental to the adversarial process that a party not file a Brief in Opposition with this Court that, however tiny, is downright permeated with bald inaccuracies presented in blatant bad faith.

Upjohn, citing *Gillen* and *Simmons,* claimed in its brief to the appellate court that Mann could not appeal from the circuit court's order dismissing her case for want of prosecution. That court, eager though it was to deny Mann even *consideration* of her appeal on the merits, disagreed.

Upjohn also contends, at least as preposterously and utterly without purported legal citation or theory, that Mann *could not challenge the federal constitutionality* of the circuit court's explicitly-stated prerequisites (stated to her as court policy) to a trial-date continuance: that the moving party have taken a *pro forma* minimum number of depositions, and have designated a *paid* opinion trial witness. Upjohn says at p. 6 that Mann's "sole remedy was to appeal the denial of her motions to vacate the dismissal," and that "[i]n Illinois, issue is subject to the abuse of discretion standard."

Upjohn also declares without legal citation or explanation that Mann *cannot challenge the federal constitutionality* of the appellate court's overt refusal to hear her appeals from the earlier-granted summary judgments., and that Mann cannot challenge the constitutionality of the appellate court's wholesale *sua sponte* unexplained conclusions of *fact* that contradict the trial court's findings and the tangible court record (including actual admissions by Upjohn's counsel, and clearly written documents) upon which those trial-court findings were based.

In short, Upjohn provides no legal authority or legal theory whatsoever in support of its odd claim that Mann could not challenge the federal constitutionality of Illinois law and of Illinois court policy and of Illinois court rulings in her case. In *the only sentence* in which Upjohn actually *acknowledges* that – oh, yeah, by the way – Mann alleges "that the Illinois courts violated her due process and equal protection rights," it tells this Court, at p. 7, not to consider the validity of those allegations because those allegations are allegations.

That's it. That's Upjohn's response to Mann's Fourteenth and Seventh Amendment argument – not a *summary* of Upjohn's response but the *entirely* of the response. Unless, that is, you count the misrepresentation on p. 8 that *Hedgebeth v. North Carolina*, 334 U.S. 806 (1948) precludes challenges to the constitutionality of a state law if the state law being challenged would, under state law, permit the state conduct being challenged.

Mann recognizes that Upjohn was not required to file a Brief in Opposition at all. But since it did file one, it was required to respond in good faith. It did not do that, and is using its right to file a Brief in Opposition as a tactic of subterfuge, as a decoy.

III. Upjohn Impliedly Misrepresents Portions of the Court Record.

In her petition to this Court, Mann recounted a few of the items on the appellate court's extensive list of its grievances against her in her handling of the case, grievances that that court cited as its grounds for its ruling. One of those grievances, as noted above, was that Mann had objected to some of Upjohn's blitzkrieg of discovery demands. Another was that she had withdrawn a motion to name a Harvard Medical School professor as an opinion witness. There were others that she mentioned in her petition and a few that she lacked the space there to mention, but these two specific instances serve well to illustrate several points. As Mann noted in her

petition, both instances arose because *Upjohn's* counsel consciously, tangibly violated discovery and ethical rules.

In the former instance, Upjohn's lawyers repeatedly violated codified discovery procedure, and Mann's objections to the interrogatories were sustained because the trial judge *looked at the tangible evidence* of the violation: the sets of interrogatories, most of which exceeded by nearly 200 the number of interrogatories allowed per set without prior court leave to serve them. In the latter instance, Mann withdrew her motion (for leave to name that physician as an opinion witness) moments after Upjohn's counsel stated at a hearing – with no prior notice to Mann – that her co-counsel had, at her request, phoned the physician and began questioning him and that the physician had made some statements in that conversation that contradicted Mann's claim concerning the casual relationship between the prescription drug at issue and her illnesses when using the drug. As Mann also said in her petition, that physician later that day told her that he indeed had made the comments to Upjohn's counsel but that he had done so in response to that attorney's specific representations of fact concerning the timing of certain matters. Those representations of fact were, verifiably, not true.

Mann noted in her petition that with respect to the former set of incidents, the court record reflected not only the tangible fact that Upjohn had, as Mann alleged, far exceeded the allowable number of interrogatories and that it had done so repeatedly, but also that the trial court had entered orders *sustaining* Mann's objections. She noted with respect to the latter incident that although there was no transcript of Mann's phone conversation with the physician, there *was* in the record a transcript of the hearing in which Upjohn's counsel had said *in contesting Mann's motion* that her legal associate had contacted the physician, a clear violation of Illinois procedural law and the attorney code of ethics. And she noted that she had memorialized in a sworn affidavit the substance of her own phone conversation with the physician, and had made that affidavit a part of the court record.

She commented that the appellate court failed not only to mention these facts and comparable facts concerning other items on its grievance list, but also failed to explain why it thought the incidents themselves were relevant to any issue on appeal; the court simply stated *that*, e.g., Mann had objected to some of Upjohn's interrogatories and thus that Upjohn was "forced" to file motions to compel in order to pursue the matters, and *that* Mann had withdrawn her motion regarding the Harvard physician. And because none of these incidents was (at least facially) related to the issues on appeal, and because that court did nothing more than simply recite those facts and say that therefore it was ruling against her, Mann was forced to argue in the alternative in her petition to this Court. Taking the appellate court's statements literally, she argues in her petition, the court was ruling that Mann's *appropriate invocation* of discovery objections (for example) justified the *denial* of her motions for trial-date continuance, the *denial* ultimately of her motion to vacate the dismissal order, and the appellate court's refusal to *consider* her appeal from the earlier-entered summary judgments. But because this is so obviously a *non sequitur*, the recitation of the neutral fact(s) when coupled with the bare conclusory statement of consequence actually, and intentionally, *implies* non-neutral facts *not* stated (and not accurate, had they *been* stated). The recitation that Mann objected to some of Upjohn's discovery demands, "forcing" it to file a motion to compel, *implies* inaccurately that the objection was *overruled* rather than sustained and was found to be frivolous and dilatory. The statement that Mann withdrew her motion concerning the physician *implies* inaccurately that she (rather than Upjohn's counsel) was acting improperly, either in filing the motion or in withdrawing it (the court is not clear on this).

Upjohn's curious selection of facts to include in its very short recitation employs exactly the same gimmick; it is veritably permeated with it. E.g., although Upjohn (apparently) concedes that only the first of the five trial-date continuances was of sufficient *length* to enable Mann to retain trial counsel, it misrepresents (at p.2) that that first trial-date

continuance in fact could have enabled Mann to retain counsel. But, as Mann said in her petition, because the trial judge had *granted summary judgment* on the only two counts then remaining, the lawsuit *was procedurally dead* during the *middle four months* of that eight-month-continuance time period, so until the court granted Mann's motion pursuant to 735 ILCS § 5/2-1005(g) to file additional counts *there was no pending lawsuit.* This, in fact, was *exactly what Ms. Woodbury told the chief county judge* at the above-referenced November 4, 1997, hearing when he asked her why Upjohn had not used those months to conduct the discovery that it *later* demanded.

Mann had filed the first of her unsuccessful trial-date-continuance motions *immediately after* Upjohn's motion for reconsideration of the reinstatement of the case was denied and seven weeks before the trial date that was set at that the October 29, 1996, hearing. By citing the "2005" judge's comments when setting that trial date, that Mann had better use the eight-month continuance wisely, Upjohn misrepresents that Mann was acting unwisely rather than in necessary compliance with the procedural reality after the entry of the summary judgments that temporarily ended the entire case in the trial court – as if that judge had foreseen the summary judgments later entered by another judge and did not think this intervening event significant.

Similarly, Upjohn implies falsely, at p. 5, that Mann was acknowledging fault when she "realized" a few minutes after the order was entered dismissing the case for want of prosecution that "she might be liable for Upjohn's costs if the case were indeed dismissed for want of prosecution". Mann "realized" this because Upjohn's counsel, Stephen Scheve, without prior notice to Mann moved orally for costs, rattling off a citation to some procedural statute that Mann was unfamiliar with. Ms. Woodbury was present. The judge took the motion under advisement and later denied it.

This apparently is an increasingly common type of ruse by appellate parties and appellate courts alike. In common parlance, it's known as fraud.

Respectfully submitted,

Beverly Mann